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NO. 85-6593

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARL ALLEN,

Petitioner,

-vs-

DR. STEPHEN L. HARDY and ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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30 pgs

QUESTIONS PRESENTED

1. May a federal court of appeals, consistent with Barefoot v. Estelle, 463 U.S. 880 (1983), refuse to permit an appeal in a case which presents an issue currently before this Court on the grant of certiorari?

2. Must a state prisoner who, at trial and on direct appeal, complained of the prosecution's use of peremptory challenges to exclude minority jurors, show "cause and prejudice" before he is permitted to litigate in a federal habeas corpus proceeding the merits of his claim that the prosecution's use of peremptory challenges at his trial was part of the prosecution's policy of systematically excluding minority jurors?

INDEX

QUESTIONS PRESENTED 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 8

TABLE OF AUTHORITIES

Barefoot v. Estelle, 463 U.S. 880 (1983) 1, 6

People v. Allen, 96 Ill.App.3d 871,
422 N.E.2d 100 (1981) 3, 7

People v. Payne, 106 Ill.App.3d 1034,
436 N.E.2d 1046 (1982), rev'd 99 Ill.2d 135,
457 N.E.2d 1202 (1983) 3

Swain v. Alabama, 380 U.S. 202 (1965)..... 3, 6

Batson v. Kentucky, pet. for cert. granted
105 S.Ct. 2111 (1985) 6

McCray v. New York, 103 S.Ct. 2438 (1983) 6

McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984),
rehearing en banc denied 756 F.2d 277 (1985)..... 6

Johnson v. Kemp, 781 F.2d 1483 (11th Cir. 1986) 6

Wainwright v. Sykes, 433 U.S. 72 (1977) 7

Townsend v. Sain, 372 U.S. 293 (1963) 7

Wainwright v. Greenfield, 88 L.Ed.2d 623 (1986) 7

Ulster County Court v. Allen, 442 U.S. 140 (1979) 8

Vasquez v. Hillery, 88 L.Ed.2d 598 (1986) 8

Reed v. Ross, 104 S.Ct. 2901 (1984) 8

NO. 85-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARL ALLEN,

Petitioner,

-vs-

DR. STEPHEN L. HARDY and ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 1, 1985 and December 13, 1985.

OPINIONS BELOW

The orders of the court of appeals (App. 1-2) are unreported. The opinions of the district court (App. 3-21) are reported at 556 F.Supp. 464, 577 F.Supp. 984, 583 F.Supp. 562, and 586 F.Supp. 103. The order of the district court refusing to grant a certificate of probable cause to appeal (App. 22-25) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The court of appeals denied petitioner's application for a certificate of probable cause on February 1, 1985. (App. 1.) Petitioner's timely motion to reconsider (filed on February 5, 1985) was denied without opinion on December 13, 1985. (App. 2.)

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the the Equal Protection Clause of the Fourteenth Amendment as well as the right to a jury trial secured by the Sixth Amendment to the Constitution of the United States.

This case also involves 28 U.S.C. §2253 which provides in pertinent part as follows:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

STATEMENT

After exhausting state remedies, People v. Allen, 96 Ill.App.3d 871, 422 N.E.2d 100 (1981), petitioner filed a pro se application for a writ of habeas corpus under 28 U.S.C. §2254. The district court appointed counsel, denied relief on two of petitioner's claims, and stayed disposition of petitioner's remaining claims (involving the prosecution's use of peremptory challenges) pending disposition by the Illinois Supreme Court of People v. Payne, No. 56907, granting leave to appeal from 106 Ill.App.3d 1034, 436 N.E.2d 1046 (1982).[1]

The Illinois Supreme Court refused to adopt the Sixth Amendment "representative cross-section" theory which had been applied by the state appellate court and adhered to the "long standing pattern of systematic exclusion"

---

[1] In Payne, the Illinois Appellate Court had held that "Swain [v. Alabama, 380 U.S. 202] does not apply to an accused's right not to have the State affirmatively frustrate his 6th Amendment right to a jury drawn from a fair cross section of the community." 436 N.E.2d at 1052. In the view of the state appellate court, "the 6th Amendment precludes the State, i.e., the prosecuting attorney, from affirmatively frustrating the right of the accused to a jury drawn from a fair cross section of the community by utilizing peremptory challenges to exclude blacks from the jury solely because they are Blacks." (footnote omitted) Id.

standard of Swain v. Alabama, 380 U.S. 202 (1965). People v. Payne, 99 Ill.2d 135, 457 N.E.2d 1202 (1983).

Following the decision of the Illinois Supreme Court in Payne, petitioner returned to the district court and sought leave to undertake discovery to marshal the "documentary or other evidence on the systematic exclusion of minorities from Cook County juries."[2]

Respondents opposed discovery. The district court held that petitioner could not proceed with discovery until he established "cause and prejudice" or "excusable neglect" for his failure to have presented evidence in state court of the prosecution's long standing pattern of systematic exclusion of minority jurors. 577 F.Supp. 984, 987 (App. 15).

Petitioner was thereafter granted leave to file an amended petition in which he asserted two substantive claims:

> 3. SWAIN CLAIM: Petitioner was denied equal protection of law, contrary to the Fourteenth Amendment of the Constitution of the United States when, following a systematic pattern over time, the prosecutors at petitioner's trial utilized their peremptory challenges to exclude prospective jurors who were black and Hispanic.
>
> 4. McCRAY CLAIM: Petitioner was denied his right secured by the Sixth and Fourteenth Amendment to a jury drawn from a fair cross section of the community when the prosecutors at petitioner's trial used their peremptory challenges to exclude black and Hispanic prospective jurors solely because of their race.

In an attempt to show "cause and prejudice," petitioner included the following allegations in his amended petition:

---

[2] Petitioner's Reply Memorandum in Support of Motion to Authorize Discovery, January 5, 1984, 1.

> 8. At the time the jury was selected for petitioner's trial, his attorneys were unaware that the State's Attorney of Cook County had adopted a de facto policy of using peremptory challenges to systematically exclude black and Hispanic jurors. In addition, petitioner lacked the resources necessary to compile and analyze the raw data necessary to mount a statistical attack on the prosecution's use of peremptory challenges.
>
> * * *
>
> 14. Subsequent to petitioner's trial, it became apparent that sometime prior to petitioner's trial, the State's Attorney of Cook County had adopted a de facto custom and practice of using peremptory challenges to exclude prospective jurors who were black and Hispanic. This custom and practice is reflected in the large number of decisions by state reviewing courts in which the defendant complained of the systematic exclusion of black and Hispanic jurors by the State's Attorney of Cook County [citations of 26 cases omitted].

The district court held that these allegations failed to establish "cause" and that petitioner was therefore not entitled to a hearing on his "Swain" claim. 583 F.Supp. 562, 563-64 (App. 17-18). Thereafter, the district court ruled against petitioner on his Sixth Amendment claim. 586 F.Supp. 103, 104-05 (App. 20-21).

Petitioner filed a timely notice of appeal. The district judge refused to certify that there was probable cause to appeal, concluding that an appeal would be "legally frivolous." (App. 22.) Petitioner then sought a certificate of probable cause to appeal from the court of appeals. This was request was denied without opinion on February 1, 1986. (App. 1.) Petitioner's timely request for reconsideration (filed on February 5, 1985) was denied without explanation on December 13, 1985. (App. 2.)

REASONS FOR GRANTING THE WRIT

1. The refusal of the courts below to permit petitioner to appeal flies in the face of the standards enunciated by this Court in Barefoot v. Estelle, 463 U .S. 890 (1983).

The issues which petitioner sought to present to the court of appeals involve the use of peremptory challenges to secure an all-white jury. The district court concluded that petitioner's claims were rendered "legally frivolous" by Swain v. Alabama, 380 U.S. 202 (1965). (App. 22.) The court of appeals, without explanation, accepted this result.

This Court's grant of certiorari in Batson v. Kentucky, pet. for cert. granted 105 S.Ct. 2111 (1985), cannot be squared with the district court's "legally frivolous" conclusion. Nor can petitioner's claim be deemed "legally frivolous" in light of the opinions of five members of this Court in McCray v. New York, 103 S.Ct. 2438 (1983), or of the subsequent decision of the Second Circuit in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), rehearing en banc denied 756 F.2d 277 (1985). See Johnson v. Kemp, 781 F.2d 1483 (11th Cir. 1986).

In Barefoot v. Estelle, 463 U.S. 880 (1984), the Court made plain that in order to appeal an adverse decision a habeas petitioner was not required to "show that he should prevail on the merits. . . Rather he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" Id. at 893 n.4.

Each of these standards was met in this case; the refusal of the court of appeals to permit petitioner to appeal should be summarily reversed.

2. The novel waiver rule applied by the district court in this case warrants plenary review, either by the court of appeals or by this Court.

At trial, petitioner's counsel had objected to the prosecutor's use of peremptory challenges to exclude minorities from the petit jury. Petitioner raised this issue on appeal, complaining that the exclusion of minority jurors had deprived him of rights secured by the Sixth and Fourteenth Amendments. People v. Allen, 96 Ill.App.3d 871, 422 N.E.2d 100, 104-05. The state appellate court rejected this argument because petitioner had "failed to establish the kind of systematic exclusion required by Swain." 422 N.E.2d at 104.

Petitioner sought an opportunity in his habeas corpus proceeding to establish "the kind of systematic exclusion required by Swain." In the view of the district court, however, "[t]o preserve the Swain issue for a reviewing court, [petitioner's] trial counsel should have made some showing of exclusion of minorities over time." 577 F.Supp. at 986 (App. 14.) As the district court later explained, "[c]ounsel might have been granted a continuance to garner evidence on systematic exclusion [or] [c]ounsel might have made an offer of proof and proceeded with trial." 583 F.Supp. 562, 563 (App. 17.)

Because trial counsel had not followed either of the options identified by the district court, that court concluded that before petitioner would be permitted to establish systematic exclusion of minority jurors, petitioner was required to establish "cause and prejudice" under Wainwright v. Sykes, 433 U.S. 72 (1977), or "excusable neglect" under Townsend v. Sain, 372 U.S. 293 (1963) for the default of trial counsel.

It is far from clear that a district court may require a showing of "cause and prejudice" when, as here, the state courts have addressed the merits of a prisoner's claims. Wainwright v. Greenfield, 88 L.Ed.2d 623, 628 n.3

(1986); Ulster County Court v. Allen, 442 U.S. 140, 149 (1979). Nor has this Court ever "held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner had presented the substance of his claim to the state courts." Vasquez v. Hillery, 88 L.Ed.2d 598, 605 (1986). The apparent conflict between this Court's prior decision and the "waiver" rule fashioned by the district court warrants review in this case.

The appropriateness of review is underscored by the refusal of the district court to accept as "cause" petitioner's unrebutted allegation that at the time of trial his attorneys were unaware of the prosecutor's long standing practice of systematically excluding minority juries. That this alleged unfamiliarity with an unlawful practice should constitute cause is the teaching of Reed v. Ross, 104 S.Ct. 2901 (1984).

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

March, 1986

Respectfully submitted,

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Attorney for Petitioner

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 1, 1985.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA,
ex rel. EARL ALLEN,
Petitioner-Appellant,

No. 84-2187 vs.

PEOPLE OF THE STATE OF
ILLINOIS, et al.
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 82 C 2898.
Milton I. Shadur, Judge.

ORDER

Petitioner filed for a writ of habeas corpus, 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of probable cause.

Petitioner has now filed a notice of appeal which we shall construe as an application for a certificate of probable cause. This court has carefully reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a federal right; the petitioner has failed to demonstrate that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot v. Estelle, 103 S. Ct. 3383, 3394, n.4 (1983). Accordingly, the request for a certificate of probable cause is

DENIED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 13, 19 85.

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA,
ex rel. EARL ALLEN,
Petitioner-Appellant,

No. 84-2187 vs.

PEOPLE OF THE STATE OF ILLINOIS,
DR. STEPHEN L. HARDY, and ATTORNEY
GENERAL OF STATE OF ILLINOIS,
Respondents-Appellees.

Appeal from the United States District Court for the Northe District of Illinois, Eastern Division.
No. 82 C 2898
Judge Milton I. Shadur

Plaintiff-appellant Allen has filed a motion seeking reconsideration of this Court's order denying his petition for a certificate of probable cause. After careful consideration,

IT IS ORDERED that the motion for reconsideration is DENIED.

App-2

tion by Robbins. Nevertheless the claim fails not only against Robbins but against Smith and Ballentine as well.

Under *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976) state law determines whether a person has a cognizable "property" interest in public employment. Coleman does not allege the state law source of his authority as Special Investigator or any state law protection of his employment in that position. *See* Def. R.Mem. [3-5]. In fact, Complaint ¶¶ 8–10 suggest Coleman had an ad hoc appointment by the Board after December 1, 1977, without any guaranty of continued employment and without any restriction on his removal. Clearly Coleman's allegations do not meet the pleading requirements implicit in *Bishop*.[11]

It follows a *fortiori* Coleman has not alleged facts showing any cognizable right to a hearing on his request for reinstatement and on his other grievances. And because all the allegations (Complaint ¶¶ 37, 44) as to Ballentine's acts are bound up in Coleman's quest for reinstatement, the Complaint fails to state any actionable claim against Ballentine at all.

Conclusion

Defendants' motion to dismiss is granted as to all claims against Robbins and Ballentine. Both state claims (the Complaint's Second and Third Claims) are also dismissed.

Defendants' motion is denied as to claims (1) against Smith for retaliatory termination and unlawful arrest and (2) against Frierson for unlawful arrest. Coleman's claims against Fiorenzo for unlawful arrest have not been challenged here and also stand. Defendants are ordered to answer those remaining claims on or before January 27, 1983.

11. Coleman's attempt to "fill in" the facts in his Ans.Mem. 1, 4 does not rescue his Complaint in this respect, for the Complaint itself must state a cognizable claim. *See Hill v. Trustees of Indiana University*, 537 F.2d 248, 251 (7th Cir.1976). True enough, inferences are to be drawn in favor of the Complaint, but they must be based on pleaded facts—and those are missing.

UNITED STATES of America ex rel. Earl ALLEN, Petitioner,

v.

Dr. Stephen L. HARDY, Respondent.

No. 82 C 2898.

United States District Court, N.D. Illinois, E.D.

Jan. 14, 1983.

Habeas corpus petition was filed. The District Court, Shadur, J., held that: (1) testimonial evidence was sufficient to permit jury to find defendant guilty of murder beyond a reasonable doubt; (2) petitioner was not prejudiced by prosecutor's comment during closing argument; and (3) petition would be held in abeyance pending decision of Illinois Supreme Court in another action on issue of constitutionality of all-white jury.

Ordered accordingly.

1. Habeas Corpus ⇐45.3(4)

When state court actually rules on merits of issue "waived" by failure to raise issue on appeal, cause-prejudice standard need not be met to obtain habeas review. 28 U.S.C.A. § 2254.

2. Homicide ⇐250

Testimony by two witnesses and police officers as to four statements made by one victim naming defendant as assailant before she died was sufficient to permit jury to find defendant guilty of murder beyond a reasonable doubt.

3. Constitutional Law ⇐268(8)

In criminal prosecution, prosecutor's comments in closing argument referring to

AIP 3

stricken testimony by police officer indicating he had known defendant for ten years was not so fundamentally unfair as to deny defendant due process; comment involved only an assertion that policeman knew defendant for ten years and was not any direct assertion as to defendant's criminal record. U.S.C.A. Const.Amends. 5, 14.

4. Action ⇐69(5)

Since Illinois Supreme Court granted discretionary review of criminal case to resolve issue of whether a defendant's constitutional right to impartial jury is denied when state exercises its peremptory challenges to exclude blacks and Latinos from jury, instant habeas corpus action brought by prisoner convicted in Illinois would be held in abeyance since if Illinois Supreme Court affirmed pending case, habeas corpus petitioner in instant case would likely have recourse under Illinois Post-Conviction Hearing Act and if after resolution of the pending case habeas corpus petitioner was without state court remedy, he could respond to summary judgment motion of defendant by submitting documentary or other evidence on systematic exclusion of minorities from county jury. U.S.C.A. Const. Amends. 6, 14; Ill.S.H.A. ch. 38, ¶¶ 122–1 to 122–7.

Kenneth N. Flaxman, Chicago, Ill., for petitioner.

Tyrone C. Fahner, Atty. Gen., Kenneth A. Fedinets, Asst. Atty. Gen., Chicago, Ill., for respondent.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Earl Allen ("Allen") asserts four grounds for relief in his pro se petition [1] for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent Dr. Stephen Hardy ("Hardy") has moved for summary judgment. For the reasons stated in this memorandum opinion and order, Hardy's motion is granted as to two of Allen's claims. Allen and Hardy have suggested, and this Court holds, ruling should be deferred on Hardy's motion as to Allen's two other claims pending the Illinois Supreme Court's decision in the appeal of *People v. Payne*, 106 Ill.App.3d 1034, 62 Ill.Dec. 744, 436 N.E.2d 1046 (1st Dist.1982). Those claims relate to the selection and racial composition of the jury that convicted Allen.

Facts

Allen is now confined in the Psychiatric Unit of the Menard Correctional Center, having been convicted of two murders and sentenced to two concurrent 100 to 300-year prison terms. On direct appeal his conviction was affirmed, *People v. Allen*, 96 Ill. App.3d 871, 52 Ill.Dec. 419, 422 N.E.2d 100 (1st Dist.1981).

Allen argued on appeal (96 Ill.App.3d at 871–72, 52 Ill.Dec. at 420, 422 N.E.2d at 101):

> 1. [H]e was denied his constitutional rights to an impartial jury where the State exercised its peremptory challenges to exclude blacks and Latinos from the jury.[2]
>
> 2. [H]e was prejudiced by the prosecutor's comment during closing argument.

On the authority of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) the Appellate Court rejected Allen's first contention, finding he had not shown the State systematically excluded blacks and Latinos from juries, 96 Ill.App.3d at 875–76,

1. This Court expresses thanks to Kenneth Flaxman, Esq., who accepted appointment as Allen's attorney and has provided valuable input on the current motion, including a responsible and forthright recognition of the petition's weaknesses on two of the claims. Having said that, this Court would be remiss were it not to acknowledge that the conceptual and structural underpinnings of this opinion owe most to this Court's law clerk, Thomas Scorza, Esq.

2. Its 16 peremptory challenges excluded 7 whites, 7 blacks and 2 Latinos. Defense counsel moved to discharge the jury, arguing the "State's use of peremptory challenges undercut [Allen's] right to an impartial jury selected from a cross-section of the community by systematically excluding minorities from the petit jury." Defendant's motion was denied. 96 Ill. App.3d at 874–75, 52 Ill.Dec. at 422–23, 422 N.E.2d at 103–04.

App-4

878, 52 Ill.Dec. at 423, 425, 422 N.E.2d at 104, 106. Allen's second contention was rejected because he had not been prejudiced by the prosecutor's reference in closing argument to excluded evidence that may have suggested Allen had a prior and unrelated conviction, 96 Ill.App.3d at 878–79, 52 Ill. Dec. at 425, 422 N.E.2d at 106.

Allen's Petition ¶ 11 asserts:

1. He was not proved guilty beyond a reasonable doubt.

2. He was denied his right to trial by an impartial jury because of the prosecutors' use of their peremptory challenges.

3. He was prejudiced by a prosecutor's comment during closing argument.

4. He was [unlawfully] convicted by an all-white jury.

His first and third grounds will be dealt with first, followed by a concurrent discussion of the second and fourth.

Proof Beyond a Reasonable Doubt

Allen unquestionably did not raise on direct appeal whether he was proved guilty beyond a reasonable doubt. That failure constituted a waiver under Illinois law. *People v. James*, 46 Ill.2d 71, 263 N.E.2d 5 (1970). Hardy argues (Mem. 3–4) *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), as interpreted and extended by our Court of Appeals in *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 950 (7th Cir.1982), therefore bars Allen from raising the reasonable doubt issue in this habeas proceeding. *Wainwright* and *Williams* require a showing of cause for and prejudice resulting from failure to appeal an issue, and Allen assertedly has not made those showings.[3]

Allen responds (Ans. Mem. 5) the Appellate Court did adjudicate the issue and specifically found "the evidence establishing defendant's guilt was overwhelming." 96 Ill.App.3d at 879, 52 Ill.Dec. at 425, 422 N.E.2d at 106. In turn, Hardy retorts (R. Mem. 3) the court's comment was in the context of its handling Allen's closing-argument-prejudice claim and does not reflect an adjudication on the merits.

[1] When a state court actually rules on the merits of an issue "waived" by failure to raise the issue on appeal, *Wainwright's* cause-prejudice standard need not be met to obtain habeas review. *See Williams*, 687 F.2d at 951. Here the Illinois Appellate Court specifically noted Allen did "not contest the sufficiency of the evidence against him," but it went on to pronounce that evidence "overwhelming" upon "[a] careful review of the record." 96 Ill.App.3d at 879, 52 Ill.Dec. at 425, 422 N.E.2d at 106. That certainly has the ring of a beyond-a-reasonable-doubt determination, perhaps enough to avoid *Wainwright*.

But such avoidance would give Allen cold comfort. It is unnecessary to decide whether the Appellate Court's "overwhelming" label fits the evidence. What controls here is that the evidence is at least sufficient to meet the constitutional standard of *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979) (footnote omitted):

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

[2] Allen's counsel concedes as much (Ans. Mem. 6), as he must in light of the record. Two witnesses and a police officer testified to four statements by one victim naming Allen as the assailant before she died. 96 Ill.App.3d 421–22, 422 N.E.2d genuine issue of fac tion whether the jur concluded the evide beyond a reasonabl constitutional requir *Jackson*, 443 U.S. 2792–93, Hardy is e Allen's reasonable-d of law.

Prejudicial Pros

[3] Closing argu referred (over defen testimony by a polic had known Allen App.3d at 878–79, N.E.2d at 106. All tor's comment, poss unrelated criminal and therefore entitl

But Allen can suc if he shows the pro dered his trial so u denial of due process *toforo*, 416 U.S. 637, 40 L.Ed.2d 431 (19 Court noted, the con assertion the policem years, not any dire past criminal record 52 Ill.Dec. at 425, 42 the total evidence, running in Allen's matter of law the p not render Allen's t unfair as to deny h *nelly*, 416 U.S. at Hardy is entitled to this claim too.

3. Allen's counsel is wrong in contending (Ans. Mem. 5 n. 4) Hardy argues "the sufficiency of the evidence is an unexhausted claim." Under the *James* waiver doctrine, Allen's failure to appeal on that issue means he has exhausted his state remedies. *Wainwright* imposes a *separate* restriction on habeas review of an issue "exhausted" by a petitioner's procedural default. Such a default is held to constitute an adequate and independent state ground for decision, barring federal habeas review. *See* 433 U.S. at 78–79, 81–82, 89–91, 97 S.Ct. at 2502, 2503–04, 2507–09.

4. Hardy Mem. 6–7 claim on the prosec ciently pleaded. A read together with t sion, make the natur Pet. Ans. Mem. 6 n.

5. Allen's counsel also Mem. 6), but Hardy' not know a concessic R. Mem. 4.

6. Hardy's Answer at hausted all "availab

App-5

died. 96 Ill.App.3d at 873–74, 52 Ill.Dec. at 421–22, 422 N.E.2d at 102–03. There is no genuine issue of fact material to the question whether the jury could rationally have concluded the evidence proved Allen guilty beyond a reasonable doubt. Because the constitutional requirement is met, compare *Jackson*, 443 U.S. at 325–26, 99 S.Ct. at 2792–93, Hardy is entitled to judgment on Allen's reasonable-doubt claim as a matter of law.

Prejudicial Prosecutorial Comment

[3] Closing argument by the prosecutor referred (over defense objection) to stricken testimony by a police officer indicating he had known Allen for ten years. 96 Ill.App.3d at 878–79, 52 Ill.Dec. at 425, 422 N.E.2d at 106. Allen claims the prosecutor's comment, possibly suggesting Allen's unrelated criminal past, prejudiced Allen and therefore entitles him to habeas relief.[4]

But Allen can succeed on that claim only if he shows the prosecutor's comment rendered his trial so unfair as to amount to a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). As the Appellate Court noted, the comment involved only an assertion the policeman *knew* Allen for ten years, not any direct assertion of Allen's past criminal record. 96 Ill.App.3d at 879, 52 Ill.Dec. at 425, 422 N.E.2d at 106. Again the total evidence, even with all inferences running in Allen's favor, establishes as a matter of law the prosecutor's comment did not render Allen's trial so "fundamentally unfair as to deny him due process." *Donnelly*, 416 U.S. at 645, 94 S.Ct. at 1872.[5] Hardy is entitled to summary judgment on this claim too.

Peremptory Challenges and Jury Composition

[4] Allen's counsel suggests (Ans. Mem. 2 n. 1) any claim arising from Allen's fourth ground (conviction by an all-white jury) is subsumed within his second ground (the prosecution's misuse of peremptory challenges). They might nonetheless be viewed as distinct analytically: Peremptory challenge misuse goes to the question of racial bias in the process of selecting individuals for a jury, while the jury's racial composition goes to the *result* of that process and asks whether the Constitution permits or mandates juries of certain demographic characteristics for certain defendants.

However, the two issues certainly tend to blend in practice and are often treated as two sides of the same coin. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404, 413–14, 92 S.Ct. 1628, 1634, 32 L.Ed.2d 184 (1972); *Easter v. Estelle*, 609 F.2d 756, 759–60 (5th Cir.1980). For this reason, and because Allen's petition ¶ 11(B) and (D) also meld the two issues, they will be treated together.[6]

As already noted, the Appellate Court relied on the plurality opinion in *Swain v. Alabama* to deny Allen's appeal on the peremptory challenges issue. Since then, however, another panel of the same Illinois Appellate Court has rejected the notion *Swain*, an equal protection case, is controlling on the Sixth Amendment impartial jury issue. *Payne*, 106 Ill.App.3d at 1041–42, 62 Ill.Dec. at 750, 436 N.E.2d at 1052. And this dispute has continued. *See People v. Gosberry*, 109 Ill.App.3d 674, 675–76, 678–83, 65 Ill.Dec. 99, 100–101, 103–106, 440

4. Hardy Mem. 6–7 incorrectly argues Allen's claim on the prosecutor's comment is insufficiently pleaded. Allen's *pro se* allegations, read together with the Appellate Court's decision, make the nature of his claim plain. *See* Pet. Ans. Mem. 6 n. 5.

5. Allen's counsel also concedes this point (Ans. Mem. 6), but Hardy's counsel apparently does not know a concession when he sees one. *See* R. Mem. 4.

6. Hardy's Answer at 1 concedes Allen has exhausted all "available state court remedies," and Hardy's Mem. 7 does not contend habeas review of the racial composition issue is barred by failure to raise it on direct appeal. Thus Hardy's submissions imply his understanding the issues are one. Hardy also has not suggested the jury composition claim renders Allen's petition "mixed" and therefore subject to dismissal under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). This Court too finds Allen's petition is not "mixed" either as filed or as it survives the present opinion and order.

APP-6

APPENDIX 7-11 OMITTED

situation which does not exist in any of the four cases presented, the underlying rationale of *Merritt* regarding untimely jury requests appears to be that, where the opponent would suffer no real harm by the granting of such a motion, almost any reason will suffice for the granting of such a request on behalf of a *pro se* inmate.

Under the facts of these four cases, where private counsel immediately made a motion for trial by jury at the time of his entry of appearance on behalf of the plaintiffs, this court concurs with the judgment of the court in *Ford v. Breier*, 71 F.R.D. 195 (E.D.Wis.1976) that a motion for trial by jury brought by new counsel without delay is grounds for granting the otherwise belated motion.

Accordingly, and based on the above, it is the ORDER of this court that the belated requests for trial by jury in these four cases be, and hereby are, GRANTED. SO ORDERED.

UNITED STATES of America ex rel. Earl ALLEN, Petitioner,

v.

Dr. Stephen L. HARDY, Respondent.

No. 82 C 2898.

United States District Court, N.D. Illinois, E.D.

Jan. 20, 1984.

On petition for habeas corpus relief, the United States District Court for the Northern District of Illinois, Shadur, J., 556 F.Supp. 464, held that testimonial evidence was sufficient to permit jury to find defendant guilty of murder beyond reasonable doubt, petitioner was not prejudiced by prosecutor's comments during closing argument, and petition would be held in abeyance pending decision of Illinois Supreme Court in another action on issue of constitutionality of all-white jury. On further consideration, the District Court, Shadur, J., held that: (1) failure of petitioner to make even offer of proof at trial with respect to alleged systematic exclusion of minorities from juries was procedural default under Illinois law, and (2) such default prevented the Illinois Appellate Court's decision about absence of such showing from being determination on the merits and, in that context, the appellate court could not be deemed to have forgiven petitioner's failure to proffer evidence; further federal evidentiary hearing would be dependent upon showing of excusable neglect for the default.

So ordered.

1. Criminal Law ⇐670

Failure to make even an offer of proof at trial on evidentiary point is procedural default under Illinois law.

2. Criminal Law ⇐1035(6)

To preserve issue of alleged systematic exclusion of minorities from juries for reviewing court, defendant's trial counsel should have made some showing of exclusion of minorities over time and, absent such showing, reviewing court had no predicate for reversing trial court's decision. U.S.C.A. Const.Amends. 6, 14.

3. Habeas Corpus ⇐45.3(9)

Petitioner's failure to attempt any prima facie showing at trial with respect to alleged systematic exclusion of minorities from juries prevented the Illinois Appellate Court's decision about absence of such showing from being determination "on the merits," and in that context, the appellate court could not be deemed to have forgiven petitioner's failure to proffer evidence; hence, federal habeas court evidentiary hearing would be dependent upon showing of excusable neglect for the default. U.S.C.A. Const.Amends. 6, 14.

App 12

Kenneth N. Flaxman, Chicago, Ill., for petitioner.

Neil F. Hartigan, Atty. Gen., State of Ill., Mark L. Rotert, Asst. Atty. Gen., Michael Shabat, Sp. Asst. Atty. Gen., Chicago, Ill., for respondent.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Earl Allen ("Allen") originally advanced four grounds for relief in his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Almost exactly a year ago this Court (in the "Opinion," 556 F.Supp. 464 (N.D.Ill. 1983)) granted the motion of respondent Dr. Stephen Hardy ("Hardy") for summary judgment on two of those grounds, deferring consideration of the other two pending the Illinois Supreme Court's decision on the further appeal of *People v. Payne*, 106 Ill.App.3d 1034, 62 Ill.Dec. 744, 436 N.E.2d 1046 (1st Dist.1982).

Now *Payne* has been decided by that Court (Docket No. 56907, Dec. 1, 1983), so Allen's remaining claims are ready for further consideration. They assert (a) the prosecutor improperly exercised his peremptory challenges to exclude minorities from the jury, thus denying Allen his right to an impartial jury, and (b) Allen was [unlawfully] convicted by an all-white jury.

Allen now moves for an order authorizing discovery to present the proof needed to support those claims.[1] Dr. Hardy resists such discovery, contending:

1. Allen failed to present evidence at trial in support of his claim, thus waiving that claim. Similarly, his argument on appeal attacked the peremptory challenges in *his* case rather than on a systematic basis, again waiving the right to present the latter argument here.

2. Allen's request to subpoena state prosecutors to question them regarding use of peremptory challenges would encroach on the insulation the judiciary has historically given to the use of peremptory challenges.

3. Allen's request for expenses under the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1), should not be authorized until it has been shown Allen cannot get "free" help.

For the reasons stated in this memorandum opinion and order, the need for the parties' further amplification of Hardy's first argument prevents consideration of the remaining contentions at the time.

Facts[2]

Allen is now confined in the Menard Correctional Center Psychiatric Unit, having been convicted of two murders and sentenced to two concurrent 100- to 300-year prison terms. On direct appeal his conviction was affirmed, *People v. Allen*, 96 Ill. App.3d 871, 52 Ill.Dec. 419, 422 N.E.2d 100 (1st Dist.1981).

At trial Allen's defense counsel had moved to discharge the jury, detailing how the State had exercised its challenges to exclude 7 whites, 7 blacks and 2 Latinos and arguing "the systematic exclusion of all blacks and all Latinos from the jury is improper and in violation of Mr. Allen's constitutional right to have a fair jury selected from a cross section of the community" (R. 304). In reply the prosecutor gave his reasons for excluding 2 Latinos and said "the record will speak for itself" (R. 304–05). Allen's motion was denied.

1. Much earlier (before issuance of the Opinion—see Allen Dec. 8, 1982 Mem. 4–5) Allen suggested the possibility this Court should adopt the test since rejected in *Payne* (though embraced by Justice Simon's dissent in that case and by *McCray v. Abrams*, 576 F.Supp. 1244 (E.D.N.Y.1983)), under which *Swain v. Alabama* (discussed at length later in the text) would not control claims under the Sixth Amendment (see n. 4). However the filings on the current motion make no mention whatever of any standard other than that announced in *Swain*. This Court therefore finds Allen's possible alternative argument abandoned or waived—in any case, no longer assertable. It therefore has no occasion to address the issues, and its discussion of *Swain*-related questions implies no holding either way on the issues so vigorously advanced by Justice Simon.

2. In part this statement plagiarizes the Opinion.

App 13

On appeal Allen argued in part that the State's use of its peremptory challenges to exclude blacks and Latinos from the jury had deprived him of his right to an impartial jury. In response the Appellate Court adhered to the analysis in *Swain v. Alabama*, 380 U.S. 202, 227, 85 S.Ct. 824, 839, 13 L.Ed.2d 759 (1965), under which a defendant had to show systematic exclusion of minorities from actual jury service over a period of time before the burden shifted to the prosecutor to justify his actions.[3] Though *Swain* was an equal protection case, the Appellate Court applied its analysis to Allen's Sixth Amendment claim[4] as well as his equal protection argument. Because Allen had made no showing in the trial court of exclusion of minorities over time, the Appellate Court said, "it is clear that he has failed to establish the kind of systematic exclusion required by *Swain*." 96 Ill.App.3d at 875–76, 52 Ill.Dec. at 423, 422 N.E.2d at 104.

Waiver

Hardy first points to Allen's failure at his trial to present any evidence or to make an offer of proof of systematic exclusion of minorities over time. Under *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982) that failure is said to be a procedural default that bars federal habeas relief, absent a showing of cause and actual prejudice. Allen offers a twofold response:

1. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) allows for federal habeas evidentiary hearings whenever there is not a full and fair hearing in state court.

2. Because the Appellate Court decided the merits of Allen's claim, the prior procedural default (if any existed) would not bar habeas relief. See *Engle*, 456 U.S. at 135 n. 44, 102 S.Ct. at 1575 n. 44.

[1, 2] Hardy correctly urges the failure to make even an offer of proof at trial on an evidentiary point is a state procedural default. *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 649–50 (7th Cir. 1982); *United States ex rel. Broadnax v. DeRobertis*, 565 F.Supp. 327, 333 (N.D.Ill. 1983). And if *Swain* states the constitutional rule, Allen's objection perforce requires an evidentiary showing. To preserve the *Swain* issue for a reviewing court, Allen's trial counsel should have made some showing of exclusion of minorities over time. Absent that proof, the reviewing court had no predicate for reversing the trial court's decision.[5] *Broadnax*, 565 F.Supp. at 332–33.

[3] Allen correctly says *Townsend* allows federal habeas courts to hold evidentiary hearings. At the same time *Townsend*, 372 U.S. at 317, 83 S.Ct. at 759 defined the limits of that concept:

> If, for any reason not attributable to the inexcusable neglect of petitioner, see *Fay v. Noia*, *post* [372 U.S. 391], p. 438

3. In so doing the Appellate Court declined to follow the lead of some state courts (construing their own constitutions rather than the United States Constitution) in holding that once a defendant shows a substantially disproportionate number of the excluded prospective jurors are members of identifiable minorities, the burden shifts to the State to show a permissible reason for exclusion. See, *e.g.*, *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

4. This Court regularly notes the lack of precision in the courts' (and its own) convenient shorthand reference to underlying Bill of Rights provisions rather than to the Fourteenth Amendment (which of course imposes the only direct curbs on a state actor). In this case, however, the distinction is more than semantic. It was only post-*Swain* that the Supreme Court held the Sixth Amendment applicable to the States via the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968). Thus *Swain* cannot be *direct* precedent on the Sixth Amendment-type claim.

5. For that reason Hardy's argument that Allen failed to raise the issue on appeal misses the mark. Allen did raise both his Sixth and his Fourteenth Amendment claims on appeal. Of course the Appellate Court could not itself take evidence on the relevant issue. Thus Allen's legal argument that the evidentiary test should be changed as a matter of constitutional law cannot be deemed a failure to raise the issue on appeal in the sense of *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir.1983).

APP 14

[83 S.Ct. 822 p. 848, 9 L.Ed.2d 837] (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexcusable default set down in *Fay v. Noia* adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures. Compare *Price v. Johnston*, 334 U.S. 266, 291 [68 S.Ct. 1049, 1062, 92 L.Ed. 1356]: "The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

Since *Townsend* our Court of Appeals has determined the "cause and prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (as reaffirmed in *Isaac*) has replaced *Fay's* "deliberate bypass" standard in determining the effect of failure to raise an issue on appeal. *Spurlark*, 699 F.2d at 357–61. Whether our Court of Appeals would also apply the "cause and prejudice" standard in the *Townsend* context is unresolved. See *Thomas v. Zant*, 697 F.2d 977, 981–86 (11th Cir.1983); *Guice v. Fortenberry*, 661 F.2d 496, 507 n. 25 (5th Cir.1981).

As the quoted *Townsend* language reflects, a federal evidentiary hearing is dependent on a showing of no "inexcusable neglect." Yet Allen's appointed counsel in this Court has suggested no excuse for Allen's trial counsel's failure to make the offer of proof.[6] Instead Allen contends no procedural default bars habeas relief because the Appellate Court considered Allen's claim on its merits.

Not so. All the Appellate Court decided was that no record evidence supported Allen's claim under the *Swain* analysis, held applicable to both his Sixth and his Fourteenth Amendment claims. Indeed that was all the Appellate Court *could* do, given the lack of record evidence and its refusal to change the constitutional test. *Broadnax*, 565 F.Supp. at 332–33. If there is to be any meaning to the notion a failure to offer evidence can be a state procedural default, no "forgiveness" of that default can be found in the Appellate Court's affirmance of the trial court based upon the *lack* of such evidence.

In short Allen's failure to attempt any prima facie *Swain* showing prevented the Appellate Court's decision about the absence of such a showing from being a determination "on the merits." In that context the Appellate Court cannot be deemed to have "forgiven" Allen's failure to proffer evidence.

Conclusion

This Court is presently without the means to determine whether Allen can show "excusable neglect" (*Townsend*) in the form of "deliberate bypass" (*Fay*) or "cause and prejudice" (*Spurlark* and *Wainwright*). Allen's counsel is ordered to address himself to those issues promptly, on a schedule to be set at today's status hearing. Allen's motion to authorize discovery must be deferred pending resolution of that issue.

6. Because no showing has been tendered at all, this Court need not decide whether the *Fay* or *Wainwright* standard applies in this Circuit. Of course if Allen can meet the "cause and prejudice" test, a fortiori *Fay's* lesser standard would be met.

App 15

IT IS THEREFORE ORDERED that:

Wilbur L. Scheller's motion for summary judgment is granted. The motion for summary judgment filed on behalf of the other defendants is also granted. The pendent claims for breach of contract and violation of the Colorado Civil Rights Act are dismissed. The trial date of July 23, 1984 is vacated.

UNITED STATES of America ex rel. Earl ALLEN, Petitioner,

v.

Dr. Stephen L. HARDY, Respondent.

No. 82 C 2898.

United States District Court, N.D. Illinois, E.D.

April 17, 1984.

In a habeas corpus proceeding, the District Court, 556 F.Supp. 464, granted motion for summary judgment on two of petitioner's grounds, deferring consideration of the other two grounds. After the remaining claims became ready for further consideration, the District Court, 577 F.Supp. 984, deferred decision pending a showing of cause and prejudice or excusable neglect for failure properly to preserve claims for appeal. The District Court, Shadur, J., held that petitioner, who alleged that his attorneys were unaware of state's attorney's de facto policy of using peremptory challenges for systematic exclusion of minorities from jury, and who allegedly lacked resources to compile and analyze statistics necessary to show systematic exclusion over a period of time, failed to show cause and prejudice or excusable neglect for his failure properly to preserve claims for appeal.

Petition dismissed.

1. Habeas Corpus ⇐25.1(4)

Habeas petitioner, who alleged that his attorneys were unaware of state's attorney's de facto policy of using peremptory challenges for systematic exclusion of minorities from jury, and who allegedly lacked resources to compile and analyze statistics necessary to show systematic exclusion, but who did not even attempt to make offer of proof, did not show cause and prejudice or excusable neglect for his failure properly to preserve claims that peremptory challenges were used to exclude minorities from jury and that he was unlawfully convicted by all-white jury. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐1033(6)

In order to preserve habeas petitioner's improper jury selection issue for appeal, all that would have been required was some showing, even by counsel's statements if need be, that over a period of time the state had systematically excluded minorities from jury panel, and any lack of resources did not excuse counsel's failure to rely on correct legal standard and seek leave to make offer of proof in the first instance.

3. Habeas Corpus ⇐25.1(4)

Habeas petitioner's claim that *Swain v. Alabama* does not control claims under the Sixth Amendment was waived or abandoned where filings on his current motion made no mention whatever of any standard other than that announced in *Swain*. U.S.C.A. Const.Amend. 6.

Kenneth N. Flaxman, Chicago, Ill., for petitioner.

Mark L. Rotert, Asst. Atty. Gen., Neil F. Hartigan, Ill. Atty. Gen., Chicago, Ill., for respondent.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Earl Allen ("Allen") originally advanced four grounds for relief in his 28 U.S.C. § 2254 ("Section 2254") petition for writ of habeas corpus. This Court's 556 F.Supp. 464 (N.D.Ill.1983) granted the motion of respondent Dr. Stephen L. Hardy ("Hardy") for summary judgment on two of those grounds, deferred decision on the other two pending the Supreme Court's decision on the appeal of *People v. Payne*, 99 Ill.2d 135, 75 Ill.Dec. 1034, 62 Ill.Dec. 744, 436 N.E.2d 1293 (1st Dist.1982).

After *Payne* was decided (99 Ill.2d 135, 75 Ill.Dec. 1034, 436 N.E.2d 1293 (1983)) Allen's remaining claims became ready for further consideration. They assert (a) the prosecutor exercised his peremptory challenges to exclude minorities from the jury, denying Allen his right to an impartial jury, and (b) Allen was [unlawfully convicted by an all-white jury. Then this Court's 577 F.Supp. 984 (N.D.Ill.1984) ("Opinion II," 577 F.Supp. 984 (N.D.Ill.1984)) deferred decision on Allen's motion for discovery on those two claims pending a showing of "cause and prejudice or excusable neglect"[1] for his failure properly to preserve those claims for appeal.

[1] Now Allen has filed an Amended Petition for Writ of Habeas Corpus,"[2] asserting two "cause and prejudice" for his failure:

1. Allen's attorneys were unaware of the State's Attorney's de facto policy of using peremptory challenges for systematic exclusion of minorities from jury.

1. Since Opinion II issued, the Supreme Court has held in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Wainwright* no evidence of insanity was ever presented, and defendant's plea had raised the issue. *Wainwright*, is one in which the record was not fully developed in the state court. Accordingly this Court determines that the cause and prejudice standard applies.

2. In addition the Amended Petition drops the "United States of America ex rel."

§ 2254 ("Section 2254") petition for a writ of habeas corpus. This Court's "Opinion I," 556 F.Supp. 464 (N.D.Ill.1983), granted the motion of respondent Dr. Stephen Hardy ("Hardy") for summary judgment on two of those grounds, deferring consideration of the other two pending the Illinois Supreme Court's decision on the further appeal of *People v. Payne*, 106 Ill.App.3d 1034, 62 Ill.Dec. 744, 436 N.E.2d 1046 (1st Dist.1982).

After *Payne* was decided by that Court (99 Ill.2d 135, 75 Ill.Dec. 648, 457 N.E.2d 1202 (1983)) Allen's remaining claims became ready for further consideration. They assert (a) the prosecutor improperly exercised his peremptory challenges to exclude minorities from the jury, thus denying Allen his right to an impartial jury, and (b) Allen was [unlawfully] convicted by an all-white jury. Then this Court's "Opinion II," 577 F.Supp. 984 (N.D.Ill.1984), deferred decision on Allen's motion for discovery on those two claims, pending Allen's showing of "cause and prejudice" or "excusable neglect"[1] for his failure properly to preserve those claims for appeal.

[1] Now Allen has tendered a "First Amended Petition for Writ of Habeas Corpus,"[2] asserting two "causes" for such failure:

> 1. Allen's attorneys were unaware of the State's Attorney's de facto policy of using peremptory challenges for the systematic exclusion of minorities from the jury.
>
> 2. Allen lacked resources to compile and analyze the statistics necessary to show such systematic exclusion over a period of time, as required by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

Respondent contends those two reasons are not sufficient cause for Allen's failure to have tendered any evidence at all. This Court agrees.

As to the first asserted ground, for nearly a decade before Allen's April 1979 trial Illinois courts had clearly applied *Swain* to charges of improper jury selection, without distinguishing between the Sixth and Fourteenth Amendments.[3] *People v. Butler*, 46 Ill.2d 162, 164-65, 263 N.E.2d 89, 90-91 (1970), adhered to in *People v. King*, 54 Ill.2d 291, 298, 296 N.E.2d 731, 735 (1973). When Allen's trial counsel saw to what use the prosecutor was putting his peremptory challenges, counsel could have—in conjunction with a motion challenging the jury selection—sought leave to introduce evidence that would meet the *Swain* standard. At that point the state judge would have had the issue posed squarely and could have dealt with it in any of several ways. For example:

1. Counsel might have been granted a continuance to garner evidence on systematic exclusion.

2. Counsel might have made an offer of proof and proceeded with the trial. At that point the State might have been forced to operate at its peril, with an ultimate acquittal serving to terminate Allen's exposure and an ultimate convic-

1. Since Opinion II issued, our Court of Appeals has held in *Weber v. Israel*, 730 F.2d 499 (7th Cir.1984) that a defendant's failure to raise his right to a jury trial on his insanity plea was a state procedural default subject to the cause-and-prejudice standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Weber* no evidence on the issue of insanity was ever presented even though defendant's plea had raised the issue. This case, like *Weber*, is one in which the evidentiary record was not fully developed in the state court. Accordingly this Court determines the cause-and-prejudice standard applies here as well.

2. In addition the Amended Petition proposes to drop the "United States ex rel." portion of the caption and to name two new respondents, the Warden of the Menard Correctional Center and the Attorney General of Illinois, in place of Hardy. Though leave to file the Amended Petition is granted, this order retains the original case name to avoid confusion.

3. This Court of course recognizes the anomaly inherent in speaking of the Sixth Amendment as though distinct from the Fourteenth, where (as here) we deal with state actors. But the common (albeit imprecise) usage, referring to the Bill of Rights provision as though directly applicable, is both convenient and meaningful in this case. As Opinion II observed, 577 F.Supp. at 986 n. 4, "*Swain* cannot be *direct* precedent on the Sixth-amendment-type claim."

App 17

tion being subject to constitutional attack.

Allen's counsel however did *not* tender the issue to the state trial judge. As *Engle v. Isaac*, 456 U.S. 107, 134, 102 S.Ct. 1558, 1574–1575, 71 L.Ed.2d 783 (1982) teaches:

> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

Thus Allen fails on the "cause" branch of the cause-and-prejudice requirement.

[2] As for Allen's second current contention, all that would have been required to preserve the improper jury selection issue for appeal was some showing, even by counsel's statements if need be, that over a period of time the State had systematically excluded minorities from the jury panel. See *People v. Brown*, 104 Ill.App.3d 1110, 1119, 60 Ill.Dec. 843, 850–851, 433 N.E.2d 1081, 1088–89 (1st Dist.1982). More to the point, however, any lack of resources does not excuse counsel's failure to rely on the correct legal standard and to seek leave to make the offer of proof in the first instance. Although inadequate resources may excuse the inadequacy of the offer of proof if made, it does not excuse even the attempt to make the offer of proof. Thus Allen has not advanced sufficient "cause" for his failure to attempt an offer of proof under *Swain*.

[3] One matter remains. Allen's Amended Petition seeks to assert a claim based on the reasoning of *McCray v. Abrams*, 576 F.Supp. 1244 (E.D.N.Y.1983). In Opinion II (577 F.Supp. at 985 n. 1) this Court explicitly found that claim had been waived or abandoned. That holding is reaffirmed.

Conclusion

Allen is granted leave to file his Amended Petition (simply to complete the record). In accordance with Rule 4 following Section 2254, the petition is dismissed.

DELTA RICE MILL, INC., Plaintiff,

v.

GENERAL FOODS CORPORATION, Defendant.

No. J-C-83-37.

United States District Court, E.D. Arkansas, Jonesboro Division.

April 20, 1984.

Seller of rice brought action against buyer for breach of contract and bad faith. Jury brought in verdict for breach of contract in amount of $314,448, $22,000 on a bad-faith claim, and $731,000 for punitive damages. On buyer's motion to set aside verdict and to order judgment in accordance with buyer's previous motion for directed verdict, the District Court, George Howard, Jr., J., held that: (1) evidence did not warrant finding of bad-faith breach so as to support tort action of outrage on behalf of seller, and (2) evidence did not support jury's verdict for punitive damages, since buyer's conduct fell short of willfulness, wantonness, malice or conscious indifference to interest of seller.

Order accordingly.

1. Damages ⇐192

Evidence in breach of contract action, including fact that buyer directed shipment of rice even though its rice requirements had been reduced, and that it did not disclose alleged defects in rice for four weeks, did not warrant a finding of bad-faith breach so as to support an action for tort of outrage on behalf of seller.

2. Damages ⇐89(2)

Under Arkansas law, punitive damages are not ordinarily recoverable for breach of contract; exception is where evidence dem-

App 18

driver after there is an opportunity to leave the car).

At the time this Court ruled from the bench, there appeared to be a second independent ground for directing a verdict for defendant Rumors Restaurant: the lack of evidence that Mark Marrocco appeared intoxicated at the time he was served alcoholic beverages by the restaurant. *Cartwright v. Hyatt Corporation*, 460 F.Supp. 80, 82 & n. 10 (D.D.C.1978), appeared to establish that a tavern keeper can be held liable for serving an intoxicated patron under D.C.Code § 25-121(a) only if, at the time the tavern keeper served the patron the alcoholic beverages, the patron appeared to be intoxicated to those serving the drinks. In this case, there was not sufficient evidence to support a reasonable conclusion that Mark Marrocco appeared to be intoxicated to the bartender at the time he was served intoxicating beverages. At most, the evidence showed that Mark Marrocco appeared intoxicated when he finally left the restaurant.

All parties had cited the *Cartwright* case to the Court in pretrial pleadings and in open court. What all parties apparently missed, however, was that the summary judgment for the tavern keeper in *Cartwright* was reversed by our Court of Appeals on February 8, 1980. The case subsequently went to trial with a verdict for the tavern keeper. *See Cartwright v. Hyatt Corp.*, No. 77-0618, Docket Sheet at 5 & 6 (D.D.C.1980). It is understandable that this unpublished decision of the Court of Appeals escaped the attention of the parties, especially since it also escaped the attention of Shepard's, Westlaw, Lexis, and the four courts that have subsequently cited the trial judge's opinion. The second ground for a directed verdict stated in open court is accordingly no longer valid.

Nevertheless, on the contributory negligence ground, Rumors Restaurant is entitled to, and has received, a directed verdict. The assault and battery claims of Lee Norwood against Mark Marrocco, which are based on an intentional tort rather than a negligence theory, will go to the jury, as will Mark Marrocco's assault and battery claims against Lee Norwood.[3]

3. The jury subsequently returned a verdict for plaintiff Lee Norwood, but not for plaintiff Ann Norwood, on their claims against defendant Marrocco.

UNITED STATES of America ex rel. Earl ALLEN, Petitioner,

v.

Dr. Stephen L. HARDY, Respondent.

No. 81 C 2898.

United States District Court, N.D. Illinois, E.D.

June 5, 1984.

Supplemental Opinion June 26, 1984.

On defendant's motion for reconsideration of denial of relief on petition for writ of habeas corpus, 583 F.Supp. 562, the District Court, Shadur, J., held that prosecution's use of peremptory challenges to exclude minorities in defendant's case did not constitute a prima facie Sixth Amendment violation.

Motion denied.

Jury ⇐33(5.1)

Prosecution's use of peremptory challenges to exclude minorities in defendant's case did not constitute a prima facie Sixth Amendment violation. U.S.C.A. Const. Amend. 6.

Kenneth N. Flaxman, Chicago, Ill., for petitioner.

Mark L. Rotert, Asst. Atty. Gen., Neil F. Hartigan, Atty. Gen., Chicago, Ill., for respondent.

APP 19

MEMORANDUM OPINION
AND ORDER

SHADUR, District Judge.

Earl Allen ("Allen") originally advanced four grounds for relief in his 28 U.S.C. § 2254 petition for a writ of habeas corpus. In a series of three opinions[1] this Court disposed of all four claims and dismissed Allen's petition. Opinion II, 577 F.Supp. at 985 n. 1 decided Allen had waived or abandoned his Sixth Amendment[2] claim (asserting a theory found persuasive in *McCray v. Abrams*, 576 F.Supp. 1244 (E.D.N.Y.1983)). That determination was reaffirmed in Opinion III, 583 F.Supp at 564.

Allen now moves for reconsideration of the "waived or abandoned" conclusion, urging this Court to consider his Sixth Amendment claim on the merits. Although still of the view the claim was waived or abandoned, this Court has opted to consider the merits anyway. Allen's Sixth Amendment claim is rejected.

Allen's Claim

Allen contends a defendant's Sixth Amendment right to an impartial jury is violated if the prosecution uses its peremptory challenges to exclude prospective jurors who belong to a cognizable class.[3] Opinion III, 583 F.Supp. at 563–64, had held Allen's failure at trial even to attempt an offer of proof showing the systematic exclusion of jurors over time failed the "cause-and-prejudice" test of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) as to Allen's Equal Protection Clause claim. Because of its waiver conclusion this Court did not reach that issue (or any other merits issue) as to Allen's Sixth Amendment claim.

Now Allen asserts such a showing of systematic exclusion is unnecessary to preserve a Sixth Amendment claim. Rather he argues this Court should find a prima facie violation of the Sixth Amendment in the use of peremptory challenges at his own *single* trial. That prima facie case could then be rebutted by the prosecution's statement of non-discriminatory reasons for its action. See *McCray v. New York*, — U.S. —, 103 S.Ct. 2438, 2441–43, 77 L.Ed.2d 1322 (Marshall, J. dissenting from denial of certiorari); *McCray v. Abrams*, 576 F.Supp. at 1249.

Peremptory Challenges and the Sixth Amendment

Allen's position is a difficult one, given the test prescribed by the Supreme Court for evaluating Sixth Amendment claims. *Apodaca v. Oregon*, 406 U.S. 404, 413, 92 S.Ct. 1628, 1634, 32 L.Ed.2d 184 (1972) taught the Sixth Amendment has not been breached merely because no members of a defendant's race are present on his or her petit jury. Instead the defendant must prove his or her race has been "systematically excluded." That principle was reaffirmed in *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975) (exclusion of women from the venire violated the principle the jury must be selected from a "fair cross-section" of the community). Then *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979) further defined the principle,

1. "Opinion I," 556 F.Supp. 464 (N.D.Ill.1983) granted Dr. Stephen Hardy summary judgment on two of the claims. "Opinion II," 577 F.Supp. 984 (N.D.Ill.1984) deferred decision on Allen's motion for discovery on the remaining two claims, pending Allen's showing of "cause and prejudice" for his failure properly to preserve those claims for appeal. "Opinion III," 583 F.Supp. 562, 563–64 (N.D.Ill.1984) determined Allen had not made a sufficient showing of "cause and prejudice" and dismissed his petition.

2. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968) held the Sixth Amendment applicable to the States via the Fourteenth Amendment's Due Process Clause. This opinion will follow the convenient (though imprecise) practice of referring to the underlying Bill of Rights provision rather than to the Fourteenth Amendment. That practice is especially useful here, where Allen has asserted one claim based directly on the Fourteenth Amendment (its Equal Protection Clause) and another claim based on the Fourteenth Amendment's incorporation of the Sixth, via the Due Process Clause.

3. Allen argues the prosecutor in his case excluded minorities from the jury.

setting out the elements a defendant must show to establish a prima facie violation of the Sixth Amendment's fair cross-section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

To establish such "systematic exclusion" Duren presented evidence (*id.* at 366, 99 S.Ct. at 669):

> His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized.

And just last month the Court refused to reexamine the "systematic exclusion" principle as it impacts on a defendant's Sixth Amendment right to an impartial jury. *Williams v. Illinois*, — U.S. —, 104 S.Ct. 2364, 80 L.Ed.2d 836 (1984) (Marshall, J., dissenting from denial of certiorari with Brennan, J., joining him).

Allen thus confronts at least three major obstacles:

1. Some courts have expressed doubt that the Sixth Amendment's fair-cross-section requirement even extends to the jury actually chosen in an individual case (as distinct from the entire venire). *Willis v. Zant*, 720 F.2d 1212, 1219 n. 14 (11th Cir.1983); *United States v. Childress*, 715 F.2d 1313, 1319–20 (8th Cir. 1983) (en banc), *cert. denied*, — U.S. —, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *see Smith v. Balkcom*, 660 F.2d 573, 583 n. 26 (5th Cir.1981).

2. Even assuming that it does, *Grigsby v. Mabry*, 569 F.Supp. 1273, 1285–86 (E.D.Ark.1983), Allen swims against the tide in urging a standard other than Duren's "systematic exclusion" test. Courts have consistently refused to apply a different one. *United States v. Cotton*, 721 F.2d 350, 352–53 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1614 (1984); *Willis*, 720 F.2d at 1217–21; *Childress*, 715 F.2d at 1320–21; *United States v. Whitfield*, 715 F.2d 145, 146–47 (4th Cir. 1983); *United States v. Canel*, 708 F.2d 894, 898 (3d Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 165–66, 78 L.Ed.2d 151 (1983); *United States v. Jenkins*, 701 F.2d 850, 859–60 (10th Cir.1983); *see Weatherby v. Morris*, 708 F.2d 1493, 1496–97 & n. 2 (9th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 719, 79 L.Ed.2d 181 (1984).

3. To find a prima facie Sixth Amendment violation based solely on the prosecution's use of peremptory challenges to exclude minorities in Allen's own case would run directly counter to the *Apodaca-Taylor* principle that the defendant is not entitled to a jury of any particular composition, but only to a jury selected from a fair cross-section of the community.

Those obstacles are insurmountable—at least in the present state of the law.

Perhaps the law should have developed otherwise. Perhaps "systematic exclusion" should mean "systematic" in just one case—that is, the single prosecutor's systematic efforts in a single jury selection ("systematic" as distinguished from "systemic"). Perhaps the Supreme Court, the ultimate lawmaker in constitutional areas, will come to change its view. But given the Court's consistent refusal to reconsider the "systematic exclusion" test as defined in *Duren*, this Court (as the *Childress* court said) is bound to adhere to that criterion. That makes relevant to Allen's Sixth Amendment claim (as it was to his equal protection claim) the entire discussion in Opinions II and III.

Conclusion

Allen's Sixth Amendment claim stands on the same footing, and is thus barred for the same reason, as his Fourteenth Amend-

App 21

ment due process claim (Opinions II and III). Allen's motion to reconsider is denied.

SUPPLEMENTAL OPINION

Just over two weeks ago this Court issued its June 5, 1984 memorandum opinion and order in this case, dealing with the need for a showing of "systematic exclusion" of prospective jurors of a cognizable class (say blacks or other minorities) to support a Sixth Amendment claim. Now our Court of Appeals has (in the context of a federal criminal appeal, *United States v. Clark*, 737 F.2d 679, 682 (7th Cir.1984) (citations omitted)) described the continuing force of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965):

> The Supreme Court held some years ago that it is not a denial of the equal protection of the laws for a prosecutor to base peremptory challenges on racial grounds, provided that he is not doing so in pursuance of a systematic policy of racial exclusion from juries—provided in other words that there is no pattern larger than the single case. *Swain*.... Although *Swain* arose under the Fourteenth rather than the Sixth Amendment, and although subsequent decisions, such as *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), have held that racial discrimination in jury selection violates the Sixth Amendment, most courts have concluded that *Swain* is still good law fully applicable to federal as well as state trials.... Although there is some contrary authority ... several practical considerations support the majority approach.

And in a just-published (though previously issued) opinion in a habeas case challenging a state court conviction, *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, ——— (7th Cir.1984), our Court of Appeals specifically followed "*Swain* and its progeny," rejecting the invitation for reexamination of *Swain* contained in the dissent in *McCray v. New York*, — U.S. —, 103 S.Ct. 2438, 2443, 77 L.Ed.2d 1322 (1983).

Though *Clark* pointed out the Court was not there called on to decide "whether it is ever permissible to challenge, as racially motivated, the exercise (not pursuant to a systematic policy of racial exclusion) of a peremptory challenge" (At 682), both *Clark* and *Palmer* should be read in conjunction with this Court's June 5 opinion.

Jonathan E. JAFFE, Plaintiff,

v.

FEDERAL RESERVE BANK OF CHICAGO, et al., Defendants.

No. 83 C 7223.

United States District Court, N.D. Illinois, E.D.

June 5, 1984.

Former employee of a Federal Reserve bank filed suit against the bank and its alleged agents in connection with the bank's termination of employment. On a motion to dismiss, the District Court, Shadur, J., held that: (1) because each Federal Reserve Bank has the power to dismiss officers and employees at pleasure, the employee had no property interest in continued employment; (2) the allegations concerning whether adverse publicity was sufficiently stigmatizing to implicate protected liberty interests were sufficient to withstand a motion to dismiss; (3) a claim for discriminatory interference with contractual rights could not stand without allegation of differential treatment of different races; and (4) the employee sufficiently alleged special damages to be able to maintain his state law defamation action.

JAFFE

Motion to dismiss

See also, 100 F.R.I

1. Constitutional Law

Each Federal Reser "to dismiss at pleasure employees" and, therefo ee of bank had no du interest in continued em Reserve Act, § 4, sub § 341, subd. 5.

2. Federal Civil Proced

Whether publicity Federal Reserve bank cause of "racial inciden stigmatizing to implica interest could not be d ing stage in action alle had been deprived of hi seeking other employm

3. Civil Rights ⇐13.4(

Former employee bank could not maintai natory interference wit without allegation of di of different races. 4

4. Libel and Slander

Former employee bank alleged loss of Na ment in connection wit law defamation in con charge, thus fitting wit of "special damages" dismissal of defamatio

Solomon Frydman, Chicago, Ill., for plaint

M. Kathleen O'Brie defendants.

1. That at least is defen Count I, and it is a fair memorandum, rather (t such, blurs the distinct II, which alleges depriv seek other employment

App 21a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. EARL ALLEN,	)	
Plaintiff,	)	
v.	)	No. 82 C 2898
DR. STEPHEN L. HARDY, et al.,	)	
Defendants.	)	

CERTIFICATION

Earl Allen ("Allen") has just filed an appeal from the orders entered by this Court April 19 and June 5, 1984. In accordance with Fed. R. App. P. 24(a), Allen is entitled to proceed on appeal in forma pauperis unless this Court "shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed." Our Court of Appeals teaches the "good faith" concept is not a subjective one, but tracks the same "legally frivolous" standard defined in Wartman v. Milwaukee County Court, 510 F.2d 130, 134 (7th Cir. 1975). See Lucien v. Roegner, 682 F.2d 625 (7th Cir. 1982)(per curiam).

As this Court's June 26, 1984 supplemental memorandum opinion and order reflects, our Court of Appeals has twice within the past 60 days reconfirmed the continuing validity of Swain v. Alabama, 308 U.S. 202 (1965), on which this Court's appealed-from orders relied. Those Court of Appeals opinions have echoed the repeated refusal by the Supreme Court during

App 22

the past Term to reconsider Swain. Accordingly this Court must certify that Allen's appeal is not taken in "good faith" as that term is interpreted and applied by our Court of Appeals.

Milton I. Shadur
United States District Judge

Date: July 10, 1984